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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 690

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF ALFRED N. SEVERIN, DECEASED, ETC., PETITIONER

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 118-124) is reported at 101 F. Supp. 755.

JURISDICTION

The judgment of the Court of Claims was entered on January 8, 1952 (R. 125). The petition for a writ of certiorari was filed on April 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a prime contractor under a standard form construction contract with the United States may recover, on behalf of his subcontractor, damages for delay following upon authorized changes made by the Government in the contract, although the prime contractor is not liable to the subcontractor for the delay.

CONTRACT PROVISIONS INVOLVED

The prime contract with the United States contained the following provisions (R. 89, 111):

> Art. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined, as provided in article 15 hereof. But nothing provided in this article shall excuse the con-

tractor from proceeding with the prosecution of the work so changed.

Art. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

Art. 9. *Delays—Damages.* * * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor

and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further,* That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

The contract between the prime and subcontractor contained the following provision (R. 110):

> 23rd. The contractor or subcontractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the

owner or any other subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of contractor or subcontractor, or in any event for consequential damages.

STATEMENT

This case arises out of the performance of a government contract for the construction of a housing project in Atlanta, Georgia, completed in March 1937 (R. 80-81, 111). Suit was instituted by the contractor in March 1943 to recover, among other things, for alleged damages caused by delays of the Government following upon authorized changes in the contract (R. 1-8). Although the complaint alleges that "no person other than the plaintiffs is the owner * * * or interested" in the claim (R. 8), the claim in fact included losses claimed by a subcontractor which the contractor agreed to pay over to the subcontractor, if recovered (R. 69, 71, 110).

The prime contract contained the customary clauses permitting "the contracting officer * * * at any time" to make changes "within the general scope" of the contract (R. 89-90), and providing for extensions of time to complete the contract in the event of delays, including delays of the Government, for which the contractor was not responsible (R. 111-112). By specific provision of the sub-

contract the prime contractor was protected against liability to the subcontractor for delays of the Government (R. 110, 122-123).

The Court of Claims allowed the prime contractor to recover for its own damages resulting from what it found to be excessive time consumed by the Government in the redesign of the boiler house (R. 121), but held that the prime contractor could not recover on behalf of the subcontractor for the reason that it was "under no liability to the subcontractor for losses suffered by the latter as a consequence of delays caused by the Government" (R. 123).

ARGUMENT

1. The decision below is in accord with the consistent rulings of the Court of Claims that a contractor with the United States can recover only his own damages and, therefore, cannot sue for losses suffered by a subcontractor in circumstances where he is not liable to the subcontractor. *Severin* v. *United States,* 99 C. Cls. 435, 442-444, certiorari denied, 322 U.S. 733; *James Stewart & Co.* v. *United States,* 105 C. Cls. 284, 330-331; *Continental Illinois Nat. Bank* v. *United States,* 112 C. Cls. 563; *Pearson, Dickerson, Inc.* v. *United States,* 115 C. Cls. 236, 264. The fundamental principle of damages in contracts between private parties is compensation for actual loss. See Williston on *Contracts* (1937), § 1338. Application of this principle of private contract law would therefore pre-

clude the contractor's recovery where, as here, he has suffered no injury.

Just as in suits between private parties, the plaintiff in an action against the United States for breach of contract "can recover no more than the loss he has suffered and of which he may rightfully complain." See *Perry* v. *United States,* 294 U.S. 330, 354. But, in the case of the United States, the attempt to secure more than the plaintiff's own damages meets additional obstacles. The absence of Congressional consent prevents the subcontractor from maintaining a suit in his own behalf. *Merritt* v. *United States,* 267 U.S. 338, 340. Obviously, Congress has not consented to the circumvention of this fundamental jurisdictional barrier by the subterfuge of permitting the contractor to sue for the subcontractor's benefit. See *Continental Illinois Nat. Bank* v. *United States,* 112 C. Cls. at 566. Any damages resulting from actionable conduct of the United States for which the prime contractor is answerable to the subcontractor are, of course, recoverable as a part of the prime contractor's own losses. But he cannot recover for losses which he does not suffer.

2. The well-settled rule of the Court of Claims, applied in the instant case, is not in conflict with *United States* v. *Blair,* 321 U.S. 730, as asserted by petitioner. The *Blair* case expressly followed the principle announced in *Hunt* v. *United States,* 257 U.S. 125, that a contractor may recover the reasonable value of services required by the Government

in addition to those called for in the contract, even where performed by a subcontractor, because "the obligation to pay for that service was to him, whether he performed it personally or through another" (257 U.S. at 129).

There is a plain distinction between requiring the Government to pay for extra services demanded and received by the United States, as in the *Hunt* and *Blair* cases, and denying recovery to a contractor, as in the present case, for damages which he has admittedly not suffered while providing no greater performance than the original contract contemplated.

It is significant, moreover, that the contracting officer in the *Blair* case "finally rendered a decision in favor of the respondent [the contractor] and the subcontractor" (p. 737). Article 15 of the contract required all disputes arising under it to be submitted for final administrative decision to the contracting officer subject to appeal to the head of the agency. Since the administrative decision was favorable to the contractor, this provided an adequate basis for his recovery. *United States* v. *Wunderlich,* 342 U.S. 98; *United States* v. *Moorman,* 338 U.S. 457.

3. As a final matter, regardless of whether in other circumstances a contractor may sue the United States on behalf of his subcontractor, recovery is prohibited in the present case by the decisions of this Court holding the Government not liable for damages resulting from delay. See, e.g.,

United States v. *Rice,* 317 U.S. 61; *Crook Co.* v. *United States,* 270 U.S. 4; *United States* v. *Foley Co.,* 329 U.S. 64.[1] The principal delay for which damages are sought here occurred in connection with the redesign of the boiler house and stack pursuant to the standard contract provisions permitting change orders. The Court of Claims held that the Government delayed more than a reasonable time after stoppage of the work in issuing the change order and was liable to the prime contractor, but not to the subcontractor, for damages flowing from this undue delay. The decisions of this Court denying recovery for delays caused by the Government afford no basis for distinguishing among varying degrees of delay. They rest on the view "that contracts such as this do not bind the Government to have the property ready for work by a contractor at a particular time" (*United States* v. *Rice,* 317 U.S. at 65), and "that changes and delays were anticipated and provided for." *United States* v. *Foley Co.,* 329 U.S. at 69. The provision for delays caused by the Government in the present contract was for an extension of the contractor's time of performance. An extension of time was granted. This constituted the exclusive relief under the contract.

[1] Though this principle, in the Government's view, should have been applied to deny recovery to the prime contractor in this case, the Government has not sought review of the award to the prime contractor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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